A

DENNIS LEE KUOK LOONG

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CRIMINAL APPEAL NO: SRA-41S-1-7-2013]
31 JULY 2013

C ***ROAD TRAFFIC:*** *Negligence - Road accident - Liability - Conviction and sentence - Appeal against - Collision between two vehicles - Whether appellant encroached onto PW1's lane - Failure to recall identity of car which overtook before collision - Whether evidence inherently incredible - Appellant's version of driving at slow speed before collision - Whether* D *defied reasoning as photographic evidence showed PW1's car a total wreck and had spun in opposite direction - Failure to mention loose gravels on road in police report - Whether appellant's defence unbelievable and failed to raise reasonable doubt - Whether appellant had fallen below standard of care and skill of competent driver - Whether conviction safe - Whether* E *sentence imposed manifestly excessive*

The appellant was charged and convicted of causing death by dangerous driving under s. 41(1) of the Road Transport Act 1978 ('the Act') and was sentenced to two years' imprisonment, as well as RM8,000 fine, in default six months imprisonment. In addition, F he was disqualified from holding a driving licence for three years from the date of his conviction as mandated by s. 41(3) of the said Act. Thus, he filed this appeal against his conviction and sentence. The collision was between a Proton Iswara car driven by PW1 and a Toyota Hilux driven by the appellant. According G to PW1, the Hilux, which was from the opposite direction, had encroached onto her lane whilst overtaking another vehicle on its lane and collided into her car, causing the death of her front passenger, while both PW1 and another passenger sustained some very serious injuries. In his defence, the appellant admitted he was H going downhill and had slowed down the speed of the car when, as he pressed the brake, the Hilux went out of control and swerved onto the Iswara's lane before colliding with it. According to the appellant, the reason for the collision was a combination of the wet and slippery road and of some loose gravels on the road. I The appellant further disparaged PW1's version of the accident because she had failed to remember the registration number, the type brand, model or colour of the vehicle which the Hilux was allegedly overtaking.

Held (dismissing appeal):

(1) PW1's failure to recall the identity of the other car that the Hilux was allegedly overtaking could not in itself render her evidence inherently incredible because accidents do not happen in slow motion. It is not humanely possible to remember all those details unless one possessed a photographic memory. Further, PW1 was ascending up a hilly road and the appellant descending it when the collision occurred so it was quite natural that she was not able to keep the oncoming vehicle in her full view as if she had been travelling on a straight road. Thus, it was reasonable that in the matter of seconds before the impact, PW1 could not be expected to know all the details of the car being overtaken by the appellant and more so when she herself was unconscious after the collision and suffered serious injuries. (para 8)

(2) The appellant's version of how the accident happened defied reasoning because if indeed he was travelling at that slow speed of 50 to 60 kmph before the collision and was braking and slowing the Hilux right before the impact, there was no reason why that impact would have caused such an extensive damage to the Iswara. As the photographic evidence showed, it was virtually a total wreck and firemen had to be called to extricate the victims from the car. The impact was so strong that the Iswara spun to the opposite direction. (para 9)

(3) The appellant failed to mention the loose gravels on the road in his police report. The loose gravels were an integral part of his defence because he said it was its combination with the wet and slippery road which caused him to lose control of the Hilux. On these considerations, his defence was not only unbelievable but failed to raise any reasonable doubt on the prosecution's case. (para 10)

(4) The prosecution had proved beyond reasonable doubt that the appellant, in overtaking whilst going downhill, had created a traffic situation which was dangerous and had fallen below the standard of care and skill of a competent driver. The conviction entered was thus safe. (para 11)

(5) The appellant was sentenced to the minimum imprisonment term of two years and the fine of RM8,000, which was just RM3,000 more than the prescribed minimum. This could not be said to be manifestly excessive in any circumstances. The

A Magistrate had no choice but to impose that imprisonment term. The alternative, which was to order that he be bound over for good behaviour would be simply unthinkable given the fatal consequences of the accident. (para 12)

B **Case(s) referred to:**
Ramiah v. PP [1972] 1 LNS 120 HC ***(refd)***

Legislation referred to:
Road Transport Act 1987, s. 41(1), (3)

C *For the appellant - Liew Tang Chieh; M/s Tang & Partners, Advocs*
For the respondent - Tuan Musli Abdul Hamid; DPP

Reported by Suhainah Wahiduddin

D

JUDGMENT

Rhodzariah Bujang J:

[1] The appellant was charged and convicted of causing death
E by dangerous driving under s. 41(1) of the Road Transport Act 1987 and was sentenced to two years imprisonment as well as RM8,000 fine in default six months imprisonment. In addition he was disqualified from holding a driving licence for three years from the date of his conviction as mandated by s. 41(3) of the said Act.
F He has filed this appeal against his conviction and sentence.

The Accident

[2] The collision was between a Proton Iswara car driven by PW1 (Rohana binti Usop) and a Toyota Hilux by the appellant.
G The Iswara car was from Betong going to Debak with two women passengers, Isah binti Bakar and Uni binti Langejang. According to PW1, the Hilux which was from the opposite direction encroached onto her lane whilst overtaking another vehicle on its lane and she did not have the time to avoid it as it
H happened too fast and the Hilux was too close. It is to be noted that the road where the collision occurred was hilly. In fact as photographs of the scene show (p. 107, vol. II of the Appeal Record) it occurred at a bend and PW1's path was the one going uphill. As a result of the accident, Isah who was her front
I passenger, passed away whilst both she and Uni sustained some very serious injuries. Uni was not called by the prosecution but offered to the defence at the close of the prosecution's case.

[3] In his defence, the appellant admitted he was going downhill whilst on third gear and had slowed down the speed of the car from about 50 to 60 kmph when, as he pressed the brake, the Hilux went out of control and swerved onto the Iswara's lane before colliding with it. The reason for this, said the appellant, was a combination of the wet and slippery road and of some loose gravels on the road. He said after the collision the Hilux's final stop was at his own lane and was moved back to the Iswara's lane with the help of passer by when it was found to be blocking the road. He admitted, however, that he did not tell the Investigating Officer (PW5) that the Hilux has been moved from its position after the collision (see p. 71 line 202 to 203 of the Appeal Record, vol. 1). He also said it was drizzling at that time.

[4] PW5 testified that he arrived at the scene at 6.30pm and the rain had just stopped. He took photographs of the vehicles as found at the scene which were marked as exh. P1(c) for the Iswara and exh. P1(g) for the Hilux and they appeared at pp. 109 and 110 of Vol. 1 of the Appeal Record, respectively. Unfortunately, there was no long shot of the vehicles which captures both vehicles in one photograph and for that I had to look at the sketch plan (exh. P4) he drew which appeared at p. 117 of vol. 1 of the Appeal Record. According to PW5, the members of the public and the appellant himself told him that the position of the Hilux he drew was as it were after the collision.

[5] In considering his defence, the learned Magistrate held that the appellant could not have lost control of the Hilux just by applying the brake even though the road was wet and slippery as it was not a case of a sudden and forceful application of the brake. From the sketch plan and the positions of the vehicles as well as the severe damage sustained by the Iswara which was totally wrecked in front, he deduced that the impact of the collision was so strong that it spun to the opposite direction.

The Sketch Plan

[6] As is generally the case for road traffic accident cases, the sketch plan drawn at the scene is a good guide for the court to find who was at fault. The presence of the shattered glasses is normally an indication of the point of impact unless it can be explained otherwise. In this case the glasses were photographed in exh. P1(K) at p. 112 of the Appeal Record as to be on the Iswara's lane, said PW5 and drawn by him in the sketch plan at p. 117 of the Appeal Record as such.

[7] Although the appellant's counsel tried to argue otherwise in his written submission, the fact that the collision occurred on the Iswara's lane is beyond refute because his own client admitted in his defence that he lost control of the Hilux and encroached onto the Iswara's lane. This admission also takes care of his submission that the Hilux was moved to the Iswara's lane after the collision. The simple issue is what caused the encroachment by the appellant - the overtaking of another vehicle or the braking of the Hilux.

Cause Of Collision

[8] The learned Magistrate has given his reason for disbelieving the appellant's version of how the accident happened as I have stated in the foregoing paragraphs of this judgment. The appellant's counsel disparaged PW1's version of the accident because she failed to remember the registration number, the type brand, model or colour of the vehicle which the Hilux was overtaking. PW5's evidence said counsel is of no help either because his investigation too did not reveal the identity of this other car driver. However, her failure to do so cannot in itself render her evidence inherently incredible because accidents do not happen in slow motion. In the split second that it happened, it is not humanly possible to remember all those details unless one possessed a photographic memory. Further, as the learned Deputy Public Prosecutor has rightly submitted, she was ascending up the hilly road and the appellant descending it when the collision occurred so it is quite natural that she was not able to keep the oncoming vehicle in her full view like if she had been travelling on a straight road. Thus, it is reasonable that in the matter of seconds before the impact, PW1 could not be expected to know all the details of the car being overtaken by the appellant and more so when she herself was unconscious after the collision and suffered serious injuries - a broken kneecap and broken ribs which took her five long months to recover.

[9] On the other hand the appellant's version of how the accident happened defies reasoning because if indeed he was travelling at that slow speed of 50 to 60 kmph before the collision and was braking and slowing the Hilux right before the impact, there was no reason why that impact would have caused such an extensive damage to the Iswara. As the photographic evidence show (exh. P1(c), it was virtually a total wreck in front and

firemen had to be called to extricate the victims from the car. The impact was so strong that the Iswara spun to the opposite direction ie, instead of facing Debak it was facing Betong.

[10] Further, as submitted by the learned Deputy Public Prosecutor, the appellant did not mention that loose gravels on the road in his police report (exh. P5) at p. 118 of the Appeal Record. The loose gravels are an integral part of his defence because he said it was its combination with the wet and slippery road which caused him to lose control of the Hilux. On these considerations, his defence was not only unbelievable but failed to raise any reasonable doubt on the prosecution's case.

[11] In the circumstances I am of the view that the prosecution has proved beyond reasonable doubt that the appellant, in overtaking whilst going downhill has created a traffic situation which was dangerous and has fallen below the standard of care and skill of a competent driver, elements of the charge as was held in *Ramiah v. PP* [1972] 1 LNS 120; [1972] 2 MLJ 258. The conviction entered was safe and the appeal against it, dismissed.

[12] With regards to the appeal against sentence, s. 41(1) of the said Act prescribes a minimum penalty of two years imprisonment and a minimum fine of RM5,000. He was sentenced to the minimum imprisonment term and the fine of just RM3,000 more than the prescribed minimum cannot be said to be manifestly excessive in any circumstances. Thus, even as I regret that one as young as the appellant, only twenty five years of age and with a bright future for he is an engineer with a public listed company, has to suffer a blight to what should be a promising career, the learned Magistrate had no choice but to impose that imprisonment term. The alternative, which was to order that he be bound over for good behaviour (given the minimum sentence prescribed by the law) would be simply unthinkable given the fatal consequences of the accident. Therefore, the learned Magistrate was not, as submitted by the appellant's counsel, fixated on the deterrence and public interest elements when sentencing the appellant. Thus, his appeal against sentence is similarly dismissed.